APPEAL NO. 021079
FILED JUNE 4, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 9, 2002. The hearing officer determined that two doctors had agreed that spinal surgery was needed and that the appellant (carrier) is liable for the costs of spinal surgery.

The carrier appeals, basically on sufficiency of the evidence, that its nonconcurring second opinion doctor's report constituted the great weight of other medical evidence and raises for the first time on appeal that the respondent's (claimant) second opinion doctor "was not even on the sublist of doctors sent to the claimant." The claimant responds, generally urging affirmance without commenting on the carrier's point that the claimant's second opinion doctor was not on the Texas Workers' Compensation Commission's (Commission) sublist.

DECISION

Affirmed.

Section 408.026(a)(1) provides that, except in a medical emergency, an insurance carrier is liable for medical costs related to spinal surgery only if before surgery, the employee obtains from a doctor approved by the carrier or the Commission a second opinion that concurs with the treating doctor's recommendation. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206(a)(13) (Rule 133.206(a)(13)) provides, in relevant part, that the term "concurrence" means "[a] second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Need is assessed by determining if there are any pathologies in the area of the spine for which surgery is proposed (i.e., cervical, thoracic, lumbar, or adjacent levels of different areas of the spine) that are likely to improve as a result of the surgical intervention." Presumptive weight will be given to the two concurring opinions and they will be upheld unless the great weight of medical evidence is to the contrary. Rule 133.206(k)(4).

The parties stipulated that the claimant sustained a compensable (low back) injury on May 10, 2001. The claimant's treating doctor referred the claimant to Dr. K, who on August 28, 2001, recommended a "microdiskectomy L5-S1." The carrier's second opinion doctor, Dr. E, nonconcurred on the basis that the claimant does not "have a nerve root compressive lesion" and has not attempted more conservative care. Dr. M, the claimant's second opinion doctor, concurred that the claimant had herniated lumbar discs, agreed with Dr. K's recommendation, and also stated, "I agree with the need for at least posterior lumbar decompression." The carrier asserts that the great weight of other medical evidence, which establishes that the claimant should not have surgery, is contrary to the concurring opinions. This was a question of fact for the hearing officer to resolve. *See* Texas Workers' Compensation Commission Appeal No. 960979, decided July 9, 1996

(Unpublished). The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a).

Although the carrier did ask the claimant how he got to Dr. M (the claimant said he was not sent by the Commission) and noted that Dr. M was not on the sublist of the second opinion doctors sent to the claimant (in evidence as Hearing Officer's Exhibit No. 5), the carrier first raises this as a point of error on appeal. While the contention raises an interesting point, we also note that Dr. E, the carrier's second opinion doctor, was also not on the sublist sent to the carrier (Hearing Officer's Exhibit No. 4). We reject the carrier's contention that the hearing officer committed reversible error because the carrier has first raised this point on appeal, and the Appeals Panel does not generally consider matters raised for the first time on appeal. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ) for criteria raised for the first time on appeal. It does, however, raise the question of whether the sublists submitted to the parties are being used. *See* requirements of Rule 133.206(c) and (d).

Nothing in our review of the record demonstrates that the determination that the great weight of the other medical evidence is not contrary to the two opinions in favor of surgery is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse the hearing officer's determination that the carrier is liable for the costs of spinal surgery on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBERT PARNELL
8411 WALNUT HILL LANE
SUITE 1600
DALLAS, TEXAS 75231-4813.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge